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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-910

E. L. BAKER, JR., and HENRY SIMON, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. _____

E. L. BAKER, JR., and HENRY SIMON, JR.;
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v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Petitioners, E. L. Baker, Jr. and Henry Simon, Jr., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the 5th Circuit rendered in Cause No. 73-3610, United States of America vs. Whitehouse Plastics d/b/a Aladdin Amusement Products, et al, on September 27, 1974.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, was entered on July 21, 1973. This judgment is not reported and is set forth herein as Appendix A, pp. A-1 - A-3. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the trial court's judgment, and is reported in 501 F.2d 692 (5th Cir., 1974) is set forth herein as Appendix B,

pp. A-4 - A-12. Petition for Rehearing was denied on October 30, 1974, and is set forth herein as Appendix C.

JURISDICTION

The opinion or judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 27, 1974. (See Appendix B, pp. A-4 - A-12, infra.) A timely petition for rehearing was denied on October 30, 1974. (See Appendix C, infra, p. A-13.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The United States Court of Appeals, 5th Circuit, held that the United States was entitled to recover a deficiency judgment against Petitioners Baker and Simon, following a Small Business Administration foreclosure sale. The Court of Appeals assumed for the purposes of their decision: (1) that Petitioners were entitled to notice of the time and place of any foreclosure sale and (2) that there was insufficient evidence on which to predicate a finding of reasonable notice with respect to either Petitioner. The questions thereby arising are:

(1) Whether the action of the Small Business Administration in disposing of the property securing the loan by foreclosure sale without notice to Petitioners is consistent with the Due Process Clause of the Fourteenth Amendment.

(2) Whether, in the event that the Small Business Administration deprived Petitioners of Due

Process of law by disposing of property securing the loan without notice to Petitioners, such action should bar recovery of a deficiency judgment by the Small Business Administration.

(3) Whether the Court of Appeals for the 5th Circuit applied the provisions of the Texas Business and Commerce Code in a manner in conflict with applicable state law.

(4) Whether the Court of Appeals for the 5th Circuit erred in considering evidence which was not admissible under the Federal Business Records Act, 28 U.S.C. § 1732(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

Statutes of the United States, 28 U.S.C. § 1732(a):

> **1732. Record made in regular course of business — Photographic copies** — (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such

business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

Statutes of the State of Texas:

§ 1.102(3) Vernon's Texas Codes Annotated, Bus. & C. Code

(a) This title shall be liberally construed and applied to promote its underlying purposes and policies.

(b) Underlying purposes and policies of this title are

(1) to simplify, clarify and modernize the law governing commercial transactions;

(2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(3) to make uniform the law among the various jurisdictions.

§ 9.504(c) Vernon's Texas Codes Annotated, Bus. & C. Code

(c) Disposition of the collateral may be by public or private proceedings and may be made by way of

one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

§ 9.507(a) Vernon's Texas Codes Annotated, Bus. & C. Code

(a) If it is established that the secured party is not proceeding in accordance with the provisions of this subchapter disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the

disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this subchapter. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

STATEMENT OF FACTS

The Small Business Administration instituted suit against Petitioners, E. L. Baker, Jr. and Henry Simon, Jr. and others, seeking to collect a deficiency judgment against Petitioners as guarantors of a loan made by the Small Business Administration to Whitehouse Plastics Corporation. Prior to suit being instituted, Whitehouse Plastics Corporation had defaulted and the Small Business Administration had foreclosed and sold at public auction the personal property securing the Whitehouse note.

In the trial court, Petitioners moved for a directed verdict contending that the government had failed to show reasonable notice to Petitioners of the time and place of sale, failed to show that the sale was commercially reasonable, and thus failed to prove its right to a deficiency. By special interrogatories, the jury found that Appellants had reasonable notice of sale; that the method, manner, time, place and terms of disposition were commercially reasonable; and that the value of the collateral was $31,696.98. Based on the jury's findings the District Judge entered judgment against Petitioners.

On appeal to the United States Court of Appeals for the 5th Circuit, Petitioners contended that the evidence was insufficient to support each of the jury's findings and that thus they were entitled to a directed verdict. Within this contention, Petitioners asserted that they were entitled to notice of sale; that the evidence was insufficient to prove notice; that absent notice, the governing law bars a deficiency judgment, or at the least, shifts to the Small Business Administration the burden of proving that the value of the property did not exceed the amount received from the sale. Petitioners further argued that if the second (burden shift) rule was the appropriate one, the Small Business Administration had failed to meet this burden of proof. As a part of this final argument, Petitioners contended that Government's Exhibit #21, a report of auction sale prepared by Rosen and Associates, Auctioneers, should not have been admitted under the business records exception.

The Court of Appeals assumed for the purposes of its decision that Texas would adopt a rule creating a rebuttable presumption that the value of the collateral equals the amount of the debt, thus shifting to the secured party the burden of proving that the value of the property was less than the amount of the debt and held that there was adequate evidence from which the jury could infer that the fair market value of the property did not exceed the amount received from the sale. The Court of Appeals also held that Government's Exhibit #21, the report of Rosen and Associates, Auctioneers, was admissible under the Federal Business

Records Statute, 28 U.S.C. Section 1732(a), and affirmed the judgment of the trial Court.

REASONS FOR GRANTING THE WRIT

(1) The decision below directly conflicts with the due process principles enunciated in this Court's ruling in *Fuentes v. Shevin*

The Court of Appeals assumed for the purposes of its decision that Petitioners were 1) entitled to notice of the time and place of any foreclosure sale; and 2) that there was insufficient evidence on which to predicate a finding of reasonable notice with respect to either Petitioner, nevertheless the Court of Appeals upheld the right of the United States to recover a deficiency judgment against Petitioners.

In *Fuentes v. Shevin*, 407 U.S. 67, this Court held that the Florida and Pennsylvania Replevin Statutes violated the Due Process Clause of the 5th Amendment to the United States Constitution because they allowed a secured installment seller to repossess goods sold without notice or opportunity for hearing and without judicial order or supervision.

In so holding, this Court stated at Page 569 of its opinion:

> "For more than a Century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 68 US 223, 233, 17 L Ed 531, 534. See Windsor v. McVeigh, 93 US 274, 23 L Ed 914; Hovey v.

> Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841; Grannis v. Ordean, 234 US 385, 58 L Ed 1363, 34 S Ct 779. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187."

In answering the contention that a hearing at a date following seizure of the goods would suffice, this Court stated at Page 570:

> "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 US 645, 647, 31 L Ed 2d 551, 556, 92 S Ct 1208."

The instant case is not complicated by a question of whether State action was involved since the foreclosure sale was conducted by the Small Business Administration. Since the Court of Appeals assumes for the purpose of its decision that "there was insufficient evidence on which to predicate a finding of reasonable notice with respect to either Petitioner," the question remaining for this Court's consideration is whether

the Small Business Administration, after having deprived Petitioners of notice and an opportunity to be heard prior to disposing of the property by foreclosure sale, should be allowed to compound this violation of due process by taking a deficiency judgment against Petitioners.

An appropriate remedy for this violation of due process would be to bar a deficiency judgment against Petitioners. Numerous authorities decided pursuant to Section 9.504 of the Uniform Commercial Code, although not based upon considerations of due process, have held that in the absence of compliance with the notice requirement, the secured party may not obtain a deficiency judgment.[1] If such remedy is appropriate for violation of a standard of commercial reasonableness established by the Uniform Commercial Code, it is an appropriate remedy to secure due process for the citizens of the United States in transactions with the Small Business Administration.

The action of the Court of Appeals in this case cannot be reconciled with the principles established by

[1]See, e.g., *Atlas Thrift Co. v. Horan*, 27 Cal.App. 3d 999, 104 Cal. Rptr. 315 (1972); *Commercial Credit Corp. v. Lloyd*, 12 U.C.C.R. 15 (Dist. Col. Sup. Ct. 1973); *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. Dist. Ct. App. 1973); *Edmondson v. Air Service Co.*, 123 Ga. App. 263, 180 S.E. 2d 589 (1971); *Braswell v. American National Bank*, 117 Ga. App. 699, 161 S.E. 2d 420 (1968); *Twin Bridges Truck City, Inc. v. Halling*, 205 N.W. 2d 736 (Iowa 1973); *One Twenty Credit Union v. Darcy*, 40 Mass. App. 64 (1968); *Camden National Bank v. St. Clair*, 309 A. 2d 329 (Me. 1973); *Foundation Discounts, Inc. v. Serna*, 81 N.M. 474, 468 P. 2d 875 (1970); *Leasco Data Processing Equipment Corp. v. Atlas Shirt Co.*, 66 Misc. 2d 1089, 323 N.Y.S. 2d 13 (N.Y.C. Civ.Ct. 1971); *Skeels v. Universal CIT Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), vacated on other grounds, 335 F. 2d 846 (CA 3, 1964); *Aimonetto v. Keepes*, 501 P. 2d 1017 (Wyo. 1972).

this Court's holding in the Fuentes case, supra, and adoption by the Court of Appeals of the alternative rule creating a rebuttable presumption in favor of the debtors does not afford an adequate remedy. The injury to Petitioners is apparent since the wrongful action of the secured party disposing of the debtor's property without notice precludes the debtor from exercising a right of redemption. In many instances the secured party would have sole and exclusive knowledge of the manner in which the sale was conducted and where numerous purchasers remove the property to various locations following an auction, as occurred in the instant case, and an appraisal by independent parties of the fair market value of the property is precluded.

It is submitted that adoption of the "no notice, no deficiency" rule by the Court of Appeals was not only necessary to secure due process of law, but was also a necessary result under applicable Texas law. The "no notice, no deficiency" rule has been characterized as the "majority view" on this issue under the Uniform Commercial Code. *Braswell v. American National Bank*, 117 Ga. App. 699, 161 S.E.2d 420, 5 U.C.C. Rep. 420 (1968), and in deciding this important issue of State law the Court of Appeals should have adopted the majority view.

(2) The Court of Appeals for the 5th Circuit decided two important questions of Texas law in a manner which conflicts with V.T.C.A. Bus & C § 1.102 (3), the purpose and rule of construction clause of the Uniform Commercial Code as enacted by the Texas Legislature.

An expressly declared purpose of the Uniform Commercial Code as enacted by the Texas Legislature, V.T.C.A. Bus & C § 1.102(3) is "to make uniform the law among the various jurisdictions." As "Erie" prognosticators, the Court of Appeals should have given effect to the avowed purpose of the Uniform Commercial Code by following precedents established by cases interpreting the Uniform Commercial Code.

Petitioners submit that the Court of Appeals first violated the purpose and rule of construction clause of the Uniform Commercial Code in following the minority view rather than the "no notice, no deficiency" rule.

Petitioners also respectfully submit that the Court of Appeals violated the purpose and rule of construction clause of the Uniform Commercial Code in holding that the price received at public sale may be evidence of fair market value of goods where no notice of such sale was given to the debtors. Petitioners have found no authorities supporting the proposition that the price received at public sale may be considered as fair evidence of the fair market value of the goods. The cases decided under the Uniform Commercial Code hold that it is *only* where the sale is conducted according to the requirements of the Code, *including the no-*

tice requirements, that the amount received or bid at a sale of collateral is evidence of its true value in an action to recover a deficiency. *Universal CIT Credit Co. v. Rone*, 248 Ark. 665, 7 U.C.C. Rep. 847 (Ark. Sup.Ct., 1970), *Schabler v. Indianapolis Morris Plan Corp.*, 234 NE 2d 665 (Ind.Ct.App., 1968), and *Community Management Association of Colorado Springs, Inc. v. Tousley v. Ford Motor Credit Co.*, 11 U.C.C. Rep. 1101 (Colo. Ct.App., 1973). With regard to this significant question of Texas law, the Court of Appeals should have followed the established precedents cited above rather than "plowing new ground" to establish the proposition that the amount received at foreclosure sale may be evidentiary of the fair market value of property disposed of at foreclosure sale. The precedents cited above are supported by sound reasoning. All recognized definitions of fair market value include the concept of a "willing seller, not compelled to sell, and a willing buyer not compelled to purchase." Simple logic dictates that the price received at foreclosure sale is not evidence of the fair market value of the property since the seller is clearly compelled to sell.

This Court should announce principles to guide the various Courts of Appeals in applying the provisions of the Uniform Commercial Code in order to achieve greater uniformity of law.

(3) In considering the evidence, the Court of Appeals for the 5th Circuit considered evidence not admissible under the Federal Business Records Statute, 28 U.S.C. § 1732(a).

Petitioners contended on appeal that Government's Exhibit #21, a report of Rosen and Associates, Auctioneers, was not admissible in evidence. The Court of Appeals held that the nature of the exhibit plus the testimony of Gresham, brought the exhibit within the Federal Business Records Statute, 28 U.S.C. § 1732(a), citing as authority *Sabatino v. Curtis National Bank*, 415 Fed. 2d 632, 635 (C.A. 5, 1969).

Gresham's testimony did not establish the basic requirements of the Federal Business Records Statute, 28 U.S.C. § 1732(a) which are:

> (A) That the record was made as a memorandum of an act, transaction or occurrence.
>
> (B) That it was made in the regular course of business; and
>
> (C) That it was the regular course of business to make such memorandum or record at the time of the act, transaction or occurrence reported, or within a reasonable time thereafter.

No representative of Rosen & Associates, Auctioneers, testified and the testimony of Norman Gresham clearly shows that he "made" or prepared no records. Gresham's testimony (Record Pages 67 and 68) establishes that he received Government's Exhibit #21 from Rosen & Associates, Auctioneers, but establishes no further

predicate for the introduction of the auctioneer's report under the Federal Business Records Statute.

The Federal Business Records Statute, 28 U.S.C. § 1732(a), provides an exception to the admissibility of hearsay on a logical, common sense basis that records which are routine reflections of the day to day operations of a business, produce unusually reliable and truthful information, *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participants furnishing the information to be recorded, act routinely, under a duty of accuracy, with the employer relying on the result. If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself and the fact that it may be recorded with scrupulous accuracy is of no avail. *Standard Oil Company of California v. Moore*, 251 F.2d 188 (C.A. 9th Cir., 1958). *United States v. Grayson*, 166 F.2d 863 (C.A. 2d Cir., 1948).

United States v. Grayson, supra, is precisely in point. In the Grayson case the Court held that certain "offering sheets" did not become competent evidence of the truth of all statements contained therein simply because the witness, White, had in the regular course of his business recorded information contained in the "offering sheets" and in so holding stated:

"the statute (28 U.S.C. § 695—now U.S.C.A. §

> 1732(a) did not mean to make competent whatever the entrant picked up from random sources although it was a part of his business to pick up information where and when he could and make a record of it. *The "act, transaction, occurrence, or event which the entrant records must be one of which either he has personal knowledge, or which he learns from a declarant who shall "in the course of business transmit the information for inclusion in the memorandum. "Multiple hearsay" is not more competent now than single hearsay was before."* (p. 869)

The Court of Appeals in its opinion relied heavily on Government's Exhibit #21, the Rosen and Associates, Auctioneers, report in forming an assumption that, apart from the absence of notice, the foreclosure sale in the instant case was conducted in a commercially reasonable manner. This error was compounded when the Court of Appeals' assumption of commercial reasonableness formed the basis for the Court's erroneous consideration of the amount received at foreclosure sale as evidence of the fair market value of the property.

CONCLUSION

For the reason stated, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the 5th Circuit.

Respectfully submitted,

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APPENDIX A

[U. S. District Court, Northern District of Texas — FILED JULY 23, 1973 — Joseph McElroy, Jr., Clerk, By ? ? ? ?, Deputy.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

* * * *

CA 4-1923

UNITED STATES OF AMERICA

VS.

WHITEHOUSE PLASTICS CORPORATION

* * * *

JUDGMENT

The issues in this case have been duly litigated in a trial before the Court and a jury held after proper notice, with the following present and participating: the plaintiff, United States of America, by an authorized Assistant United States Attorney; the defendants, Edward L. Baker, Ben Whitehouse, Jr., and Jerome I. Weiner, each in person and by his respective attorney; the defendants, Henry W. Simon, Jr., and Ben Whitehouse, Sr., each by his respective attorney. The defendant, Whitehouse Plastics Corp. though duly served with summons and notified of the setting of the case for trial, defaulted. At the conclusion of the plaintiff's

evidence, the Court granted the motion of the defendant, Jerome I. Weiner, for an instructed verdict in his favor. As to the remaining defendants participating in the trial, the Court, after the conclusion of the entire evidence, submitted all possible issues of fact to the jury in the form of special interrogatories. The jury's answers thereto have been returned and received as its verdict. The Court is of the opinion that upon the verdict of the jury and the facts established by the evidence as a matter of law the plaintiff is entitled to a joint and several judgment against the defendants, Whitehouse Plastics Corp., Ben Whitehouse, Sr., Ben Whitehouse, Jr., Edward L. Baker, Jr., and Henry W. Simon, Jr., for the portions hereinafter set out of the balance of principal and interest now due on the note sued upon.

It is therefore decreed that:

1. The plaintiff take nothing as against the defendant, Jerome I. Weiner.

2. The plaintiff recover jointly and severally from the defendants, Whitehouse Plastics Corp., Ben Whitehouse, Sr., Ben Whitehouse, Jr., Edward L. Baker, Jr., and Henry W. Simon, Jr., the sum of $212,275.86, except that the joint and several liability of the defendant, Edward L. Baker, Jr., on the principal amount is limited to $199,050.39, of the said $212,-275.85, and of the defendant, Henry W. Simon, Jr., on the principal amount is limited to $49,762.59 of said $212,275.85.

3. The defendants named in the preceding para-

graph 2 shall be jointly and severally liable for interest on the respective principal amounts due by them at the rate of 6% per annum from the date of this judgment until paid.

4. All costs of suit are taxed jointly and severally against the defendants named in paragraph 2 above. No costs are taxed against the defendant, Jerome I. Weiner.

The differences in the amounts of the recoveries allowed against the various defendants are due to the following facts: The defendant, Whitehouse Plastics Corp., as maker of the note in question, is liable for the full amount of the balance of principal and interest due thereon. The defendants, Ben Whitehouse, Sr., and Ben Whitehouse, Jr., guaranteed the full payment of any unpaid balance of principal and interest. The defendants, Edward L. Baker, Jr., and Henry W. Simon, Jr., limited their respective guarantees to a percentage of any unpaid balance of principal and interest due on the note. Those percentages are reflected by the amounts of the recoveries above provided or against them. It is the intention of the Court to provide for a recovery in favor of the plaintiff against the respective defendants in accordance with such facts, and that the recovery shall be joint and several against the defendants to the extent of the amounts of their respective liabilities.

Signed, July 21, 1973.

/s/ Leo Brewster
JUDGE

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

WHITEHOUSE PLASTICS d/b/a Aladdin Amusement Products, et al., Defendants-Appellants.

No. 73-3610.

United States Court of Appeals, Fifth Circuit.

Sept. 27, 1974.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

GODBOLD, Circuit Judge:

This action arises from an effort by the Small Business Administration, appellee, to collect under guaranty agreements signed by E. L. Baker, Jr., and Henry Simon, Jr., appellants, in connection with a 1970 loan of $200,000 to Whitehouse Plastics Corporation. Whitehouse defaulted, and SBA foreclosed and sold at public auction the personal property securing the Whitehouse note. Then SBA brought this suit seeking to establish a deficiency judgment against appellants and others.

Appellants moved for a directed verdict contending, inter alia, that the government had failed to show reasonable notice to appellants of the time and place of sale, failed to show that the sale was commercially rea-

sonable, and thus failed to prove its right to a deficiency. By special interrogatories the jury found that appellants had reasonable notice of the sale; that the method, manner, time, place and terms of the disposition were commercially reasonable; and that the value of the collateral at the time and place of sale was $31,696.98. Based on the jury's findings, the District Judge entered judgment against appellants. On appeal, appellants' basic contention is that the evidence is insufficient to support each of the jury's findings and that thus they were entitled to a directed verdict. Within this contention they assert as supporting arguments that they were entitled to notice of the sale; that the evidence was insufficient to prove notice; that absent notice the governing law would either bar a deficiency judgment or at the least shift to the SBA the burden of proving that the value of the property did not exceed the amount rereceived from the sale; and that if the second (burden shift) rule is the appropriate one, there was insufficient evidence to conclude that the SBA met its burden. As part of this final argument, appellants submit that one exhibit should not have been admitted under the business records exception to the hearsay rule. We address each argument in turn.

We may assume, without the necessity of deciding, that Texas courts[1] would find correct the following contentions of the appellants: (1) that as guarantors where the primary debtor was a business no longer in

[1]The security agreement involved here provided that Texas law would govern the transaction. We need not decide, therefore, whether in the absence of such a provision Texas law or some form of federal common law would govern.

operation they were "debtors" within the meaning of Vernon's Texas Codes Annotated, Business & Commerce [hereinafter V.T.C.A., Bus. & C.] § 9.504(c) requiring notice to "debtors" of the time and place of any public sale; (2) that under V.T.C.A., Bus. & C. § 9.501(c) the right to notice was non-waivable; and (3) that there was insufficient evidence on which to predicate a finding of reasonable notice with respect to either Baker or Simon.

[1-3] The first question thus squarely presented is whether failure to give notice precluded the SBA from recovering a deficiency judgment. Neither we nor the parties have discovered any Texas case on point, but as *Erie* prognosticators we believe that Texas would answer in the negative. The version of V.T.C.A., Bus. & C. § 9.504(c) in force at the time the parties contracted and at the time of disposition of the collateral[2] tracked the language of the Uniform Commercial Code § 9-504(3). Thus we look for guidance to the decisions

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[2] (c) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the public sale and if the collateral is of a type customarily sold in a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

of other jurisdictions deciding the effect of failure to comply with the provisions of their own statutes enacting U.C.C. § 9-504(3). Examination of those decisions reveals two conflicting lines of authority. One line holds that in the absence of compliance with the notice requirement the secured party may not obtain a deficiency judgment.[3] The other line holds that such failure does not act as a bar to recovery of a deficiency but creates at most a rebuttable presumption that the value of the collateral equals the amount of the debt, thus placing on the secured party the burden of proving that the fair market value of the goods sold was less than this amount.[4] We believe this second line of cases to be the better rule and the one which Texas would adopt.

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[3] *See, e. g.*, Atlas Thrift Co. v. Horan, 27 Cal.App.3d 999, 104 Cal. Rptr. 315 (1972); Commercial Credit Corp. v. Lloyd, 12 U.C.C.R. 15 (Dist.Col.Sup.Ct. 1973); Turk v. St. Petersburg Bank & Trust Co., 281 So.2d 534 (Fla.Dist.Ct.App. 1973); Edmondson v. Air Service Co., 123 Ga.App. 263, 180 S.E.2d 589 (1971); Braswell v. American National Bank, 117 Ga.App. 699, 161 S.E.2d 420 (1968); Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736 (Iowa 1973); One Twenty Credit Union v. Darcy, 40 Mass.App. 64 (1968); Camden National Bank v. St. Clair, 309 A.2d 329 (Me.1973); Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970); Leasco Data Processing Equipment Corp. v. Atlas Shirt Co., 66 Misc.2d 1089, 323 N.Y.S.2d 13 (N.Y.C.Civ.Ct. 1971); Skeels v. Universal CIT Credit Corp., 222 F.Supp. 696 (W.D.Pa.1963), vacated on other grounds, 335 F.2d 846 (CA 3, 1964); Aimonetto v. Keepes, 501 P.2d 1017 (Wyo.1972).

[4] *See, e. g.*, Weaver v. O'Meara Motor Co., 452 P.2d 87 (Alaska 1969); Universal CIT Credit Co. v. Rone, 248 Ark. 665, 453 S.W.2d 37 (1970); Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1968); Leasing Associates v. Slaughter & Son, 450 F.2d 174 (CA 8, 1971) (applying Arkansas law); Community Management Ass'n of Colorado Springs, Inc. v. Tousley, 505 P.2d 1314 (Colo.App. 1973); Tauber v. Johnson, 8 Ill.App.3d 789, 291 N.E.2d 180 (1972); Abbott Motors, Inc. v. Ralston, 28 Mass.App. 35 (1964); Cornett v. White Motor Corp., 190 Neb. 496, 209 N.W.2d 341 (1973); Conti Causeway Ford v. Jarossy, 114 N.J.Super. 382, 276 A.2d 402 (Dist. Ct.1971), aff'd 118 N.J.Super. 521, 288 A.2d 872 (Sup.Ct., App.Div.

The "no notice, no deficiency" rule undoubtedly serves as an incentive to compliance with the notice provisions of § 9-504(3), but the alternative of creating a rebuttable presumption favoring the debtor would also tend to serve this function and appears more in keeping with the scheme of the Code. U.C.C. § 9-507(1) [V.T.C.A., Bus. & C. § 9-507(a)] delineates the results of failure to comply with, inter alia, § 9-504 as follows:

> If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person eititled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply wih the provisions of this Part.

In view of this specific statutory remedy we doubt that the Code's drafters intended that failure to give notice would bar the creditor's right to a deficiency judgment. Other courts have reached the same conclusion, see, *e. g.*, Grant County Tractor Co. v. Nuss, 6 Wash.App.

1972); T & W Ice Cream, Inc. v. Carriage Barn, Inc. 107 N.J.Super. 328, 258 A.2d 162 (County Ct.1969); Lincoln Rochester Trust Co. v. Howard, 347 N.Y.S.2d 306 (Rochester City Ct.1973); Chase Manhattan Bank v. Lyon Air, Inc., N.Y.L.J., March 15 1971, p. 2, col. 4 (Sup.Ct.N.Y.1971), Investors Acceptance Co. v. James Talcott Inc., 61 Tenn.App. 307, 454 S.W.2d 130 (1970); Mallicoat v. Volunteer Finance & Loan Corp., 57 Tenn.App. 106, 415 S.W.2d 347 (1966); Grant County Tractor Co., Inc. v. Nuss, 6 Wash.App. 866, 496 P.2d 966 (1972).

866, 496 P.2d 966 (1972), as have at least two commentators.[5] This conclusion is strengthened by the discussion in Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538, 539-540 (1966), which indicates that amicus briefs filed in that case for the Permanent Editorial Board of the U.C.C. concluded that improper disposition by the secured party made the secured party liable for damages suffered as a result.[6]

Section 9-507 clearly gives the debtor the right to recover "any loss caused by a failure" to give notice, including necessarily any prejudice to the from any loss of his right of redemption under § 9-506 or from loss of opportunities either to encourage bidders to attend the sale or to sell off some of the property piecemeal before the date set for the sale. In short, the defendants were free to submit to the jury under § 9-507 any evidence that they were prejudiced by the lack of notice,

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[5] "Since the Code specifies in Section 9-507 that the secured party is liable in damages, there seems to be no need to add through judicial gap-filling the additional penalty of a right to recover the deficiency."

Clovis, Secured Transactions Under the U.C.C. [Vol. 1 of Bender's U.C.C. Service] 74 (Supp. 1972).

"[S]ection 9-507 has in it a specific provision for a penalty in the event of a defective disposition. The sensible thing is to apply the Code penalty and no more. . . ."

Hogan, Pittfalls in Default Procedure, 2 U.C.C. L.J. 244, 257 (1969).

[6] We also note that in the consumer goods case, § 9-507 provides for a minimum penalty of the amount of the finance charge plus 10% of the cash price. It seems highly unlikely that the U.C.C.'s drafters would have included such a provision or that the Texas legislature would have enacted it had they intended that the secured party also lose his right to recover any deficiency.

and under the second line of cases noted above the burden would be on the secured party to rebut such evidence by showing that the fair market value of the goods was no more than the amount received at the sale. Particularly where, as here, the transactions were commercial dealings between reasonably experienced businessmen, we believe that the Texas courts would not invoke a harsher rule. "No sound policy requires us to inject a drastic punitive element into a commercial context." Cornett v. White Motor Corp., 190 Neb. 496, 209 N.W.2d 341, 344 (1973).

[4] Assuming as we do that Texas would adopt a rule no harsher than that shifting to the secured party the burden of proving the fair market value of the property sold, we find that there was adequate evidence from which the jury could, as it did, infer that the fair market value of the property did not exceed the amount received from the sale. Gresham, SBA's representative at the sale, testified that he put in a "protective bid" of $17,500 for all of the property to be sold, the purpose of which he described as "to insure that the equipment does not sell at less than its under-the-hammer value; that it doesn't sell too cheaply." He further testified that he had been appraising property for the SBA for about 12 years and that he could have entered a higher "protective bid" up to a maximum of $25,000. While Gresham's assessment is subject to attack on grounds that as an employee of the secured party he was not disinterested and that the assessment was hastily made, we cannot say that it was so lacking in substance that

the jury was not entitled to give it weight. The only higher assessment of the value of the goods was that of defendant Baker, whose testimony suggests that his valuation was based on the initial cost of the property sold. The jury was entitled to reject Baker's assessment as not probative of the fair value of the property at the time and place of sale. In addition to the testimony of Gresham and Baker the jury had before it an exhibit consisting of SBA's record of the auction sale prepared by the company which conducted the auction. The exhibit contained copies of advertisements placed by the auction company concerning the sale, records of expenses incurred in conducting the sale and invoices to buyers at the sale with a description of and the prices received for the property sold. On the basis of the advertisements and Gresham's testimony that about 140 to 145 registered bidders were present, "some 30 or 40 of whom must have bid on one or more lots of property," the jury could find, as it did, that the sale was "commercially reasonable."[7] And having so found, the jury was entitled to infer that the total amount received at the sale was evidentiary of the fair value of the goods.[8] This inference combined with Gresham's lower assessment of their minimum fair value is sufficient to support the conclusion that the government met its burden of proving by a preponderance of the evidence that the fair value of the goods at the time and place of sale did not exceed $31,696.98, the net amount received

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[7] At least it was entitled to find that except as to notice to Baker and Simon the sale was "commercially reasonable," that is, that in all other respects it was conducted so as to return a fair price for the property.

[8] *Cf.*, Kolbo v. Blair, 379 S.W.2d 125 (Tex.Ct.Civ.App.1964).

from the sale.[9]

[5] The contention that the exhibit discussed above was not properly within the business records exception to the hearsay rule is without merit. The nature of the exhibit plus the testimony of Gresham brought it within the federal business records statute, 28 U.S.C. § 1732(a). "The Act does not require that the foundation testimony come from the one who kept the books or had supervision over them." Sabatino v. Curtis National Bank, 415 F.2d 632, 635 (CA 5, 1969).

Affirmed.

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[9] We do not imply that a secured party may bootstrap its way to a verdict based on the price received at the foreclosure sale where that is the only evidence of the value of the goods or where the sale is less well publicized or conducted than this one. *See* Barker v. Horn, 245 Ark. 315, 432 S.W.2d 21 (1968) (evidence of the amount received at a private sale, without more, is sufficient to meet the secured party's burden where no notice is given). No such case is before us.

APPENDIX C

[U. S. Court of Appeal — FILED OCT. 30, 1974 — Edward W. Wadsworth, Clerk.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-3610

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WHITEHOUSE PLASTICS d/b/a ALADDIN AMUSEMENT PRODUCTS, ET AL.,
Defendants,

E. L. BAKER, JR., and HENRY SIMON, JR.,
Defendants-Appellants.

Appeal for the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(October 30, 1974)

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-910

E. L. BAKER, JR. AND HENRY SIMON, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In February 1970, the Small Business Administration loaned $200,000 to Whitehouse Plastics Corporation. The loan was secured by a mortgage on the company's machinery, equipment, and furniture, and was guaranteed by petitioners, who are officers of Whitehouse. Whitehouse executed a promissory note payable to the order of Northwest National Bank, Fort Worth, Texas, the participating bank in the loan. The guaranties granted Northwest National Bank the power upon default to sell the collateral, without notice to the guarantors, at public or private sales.

Whitehouse defaulted on the payment of the note, and Northwest National Bank notified all debtors, including petitioners, of the default on or about October 1, 1970. Petitioners were also notified that payment was being accelerated in accordance with the terms of the note.

Northwest National Bank thereafter transferred and assigned the Whitehouse promissory note to the Small Business Administration. The SBA, through an auctioneer, advertised a public sale of Whitehouse's personal property. No notice of this sale was personally sent to either petitioner. The auctioneer conducted a public foreclosure sale of Whitehouse's personal property, which was attended by about 140 registered bidders, including petitioner Baker. Baker made one bid but no purchases. The net proceeds of the sale were applied by the SBA to the outstanding balance due on the loan to Whitehouse.

The United States then brought this action against petitioners and others to obtain a deficiency judgment. A jury trial was held. After the United States rested, petitioners objected that the United States had presented no evidence showing a commercially reasonable disposition of the collateral. The district court allowed the government to reopen its case to introduce the auctioneer's report, made in the regular course of business, which detailed the manner of advertising the foreclosure sale and the sums received for the auctioned personal property.

The jury returned a verdict for the United States, and the district court entered judgment in the amount of $212,275.86 (Pet. App. A A-2). Petitioner Baker's joint and several liability was limited to $199,050.39, and petitioner Simon's to $49,762.59 (*ibid.*).

The court of appeals affirmed (Pet. App. B; 501 F. 2d 692). Applying Texas law in accordance with the terms of the guaranty agreement (Pet. App. B A-5), the court assumed for purposes of the appeal that petitioners were entitled to notice of the foreclosure sale, notwithstanding the provision in the agreement purporting to waive notice, and that the evidence was insufficient to show that adequate notice was given to them (Pet. App. B A-6). The court concluded, however, that the Texas courts, if pre-

sented with the issue, would adopt the "better rule" (Pet. App. B A-7) and would hold that the failure to give notice does not preclude the SBA from recovering a deficiency judgment.

That is not to say that persons in petitioners' position would be without a remedy for the failure to give notice. If they can demonstrate that they were prejudiced by the lack of notice, that would give rise to a rebuttable presumption that the fair market value of the goods sold equals the total debt. In order to collect a deficiency judgment in those circumstances, the secured party would have the burden of showing that the fair market value equals the actual sale price (Pet. App. B A-10). The court held that the United States met that burden in the present case (*id.* at A-10 to A-12). It also held that the auctioneer's report was properly admitted into evidence under the federal business records statute (28 U.S.C. 1732(a)) (Pet. App. B A-12).

2. Petitioners contend (Pet. 10-13) that the Texas courts would bar a deficiency judgment if the foreclosure sale were conducted without adequate notice. They also argue (Pet. 14-16) that the auctioneer's report should not have been admitted into evidence. Both contentions were thoroughly considered and properly rejected by the court of appeals and do not merit further review by this Court.

Petitioners also claim (Pet. 8-10) that the failure to give them "notice and an opportunity to be heard prior to disposing of the property by foreclosure sale" (Pet. 10) constitutes a deprivation of property without due process of law in violation of the Fifth Amendment. That issue was neither presented to nor decided by the court of appeals and need not be considered by this Court. *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16.

In any event, this Court's decision in *Fuentes* v. *Shevin*, 407 U.S. 67, on which petitioners rely, is inapposite. Even assuming that a foreclosure sale involves a deprivation of property akin to a seizure pursuant to a writ of replevin, petitioners were not in personal possession of the property that was sold. "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth [here the Fifth] Amendment's protection" (*id.* at 84). There is no indication that petitioners' status as guarantors of the loan to the corporation gave them any proprietary or possessory interest in the corporation's mortgaged property.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[1]Moreover, Texas law gives a debtor the right to recover any actual loss suffered by him as a consequence of a creditor's failure to give proper notice of a foreclosure sale. See Tex. Code Ann. 9.507(a). "[T]hat statutory procedure effects a constitutional accommodation of the conflicting interests of the parties" (*Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 607).